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IN THE

Supreme Court of the United States.

October Term, 1952.

No. 268.

ALFRED VICTOR DuPONT,
Petitioner,

v.

DOROTHY ELIZABETH BARTON DuPONT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

BRIEF FOR RESPONDENT IN OPPOSITION.

I. Opinions Below.

The petition contains adequate references to the opinions of the Superior and Supreme Courts of Delaware except, as may now be noted, the opinion of the Supreme Court of Delaware now appears in 90 A. 2d 468.

II. Jurisdiction.

The Respondent denies that this Court has jurisdiction under 28 U. S. C. § 1257(3) to entertain the petition. This will be the first subject discussed, *infra*, page 5, under heading VII entitled "Reasons for Denying the Writ".

It should also be observed under the present heading that the Superior Court of Delaware had admitted jurisdiction both of the parties and of the subject matter to entertain and decide the complaint below for annulment of

marriage. Revised Code, Delaware, 1935, §§ 3497, 3502,[1] 3504.[2] The Supreme Court of Delaware had constitutional jurisdiction to hear and determine petitioner's writ of error from the Superior Court. Art. IV, Sec. 11(1), Constitution of Delaware, amended by Chapter 109, Volume 48, Laws of Delaware.[3]

III. Respondent's Counter-Statement of the Questions Presented.

Respondent's position is that the questions involved may be better stated in the following form:

1. Does this case involve a "right, privilege or immunity" of Petitioner under 28 U. S. C. § 1257(3)?

2. Does Petitioner, who married Respondent in 1948 with knowledge that Respondent had been divorced from a former husband in McLennan County, Texas, in 1940, in an action where the court had jurisdiction of the subject matter and of the persons of *both* parties, have the right and status, in a Delaware annulment action, collaterally to attack the validity of Respondent's 1940 divorce and thus to contend in the Delaware action that his own marriage to Respondent was bigamous?

3. Under the facts stated in question 1 does the Constitution of the United States (Art. IV, Sec. 1) require the Delaware Courts to accord Full Faith and Credit to Respondent's 1940 Texas divorce?

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1. "The Superior Court of this State shall have and entertain jurisdiction of all actions for annulment of marriage, or for divorce."

2. "For purposes of annulment of marriage, jurisdiction may be acquired by personal service upon the defendant within this State, when either party is a bona fide resident of this State at the time of the commencement of the action." The respondent (defendant below) was a bona fide resident of Delaware at the time the petition was filed and was served personally.

3. "Section 11. The Supreme Court shall have jurisdiction as follows:

(1) To issue writs of error in civil causes to the Superior Court and to determine finally all matters in error in the judgments and proceedings of said Superior Court in civil causes."

Question 3 would seem to involve subordinate questions which may be stated separately as follows:

4. Would Petitioner have had any right or status to attack the validity of Respondent's 1940 divorce in any judicial proceeding in the State of Texas?

5. Accepting Petitioner's theory for purposes of argument, was the Texas decree void or voidable only?

IV. Constitutional Provisions Involved.

Admittedly, the petition here deals with the proper application by the Delaware Courts of the Full Faith and Credit Clause (Art. IV, Sec. 1) of the Constitution of the United States. Respondent denies that the Due Process Clause of Sec. 1 of the 14th Amendment has any application.

V. Statement.

In conformity with Rule 12(b) of the Rules of the Superior Court of Delaware which, for all present purposes, is identical with the rule of a corresponding number of the Federal Rules of Civil Procedure, Respondent filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted, as part of her answer to the complaint (PA 12,[4] First Defense). Respondent also filed a motion for Summary Judgment under the Superior Court Rule corresponding to Federal Rule 56. Later both motions were withdrawn (PA 16) and the case proceeded to a long and tedious trial involving 2699 pages of typewritten transcript and 136 exhibits which, to the extent desired by the parties, were reproduced in the Supreme Court of Delaware and are presented here by a total of 919 printed pages of appendices.

Both the Superior Court and the Supreme Court decided this case solely upon the uncontroverted facts, i. e.,

4. Petitioner's (plaintiff's) appendix below is referred to herein as "PA"; Respondent's (defendant's) as "DA".

as on Motion for Summary Judgment. The controverted facts, including particularly Petitioner's charges of fraud and collusion in connection with Respondent's 1940 Texas divorce, have not been the subject of findings.

This situation is made clear by the following quotation from the Opinion of the Supreme Court of Delaware (R. 435; 90 A. 2d at p. 470):

> "The foregoing facts are stated to be uncontroverted. With respect, however, to the allegations of fact supporting the asserted grounds for annulment, the contentions of the parties are in direct conflict. The court below, for the purposes of the defendant's motion to dismiss, assumed that the controverted allegations should be considered as having been established by competent evidence. We will do the same, although in fairness to the defendant, it should be stated that she denies the truth of the assertions made by the plaintiff in these respects."

Petitioner's "Statement" contains, quite largely, references only to testimony on his own side of the controverted fact issues. But, there was substantial competent evidence, not only that the Respondent had never given up her Texas domicile, but also that the 1940 divorce was not collusive and that the charge of cruelty was true. DA 28, 29; PA 413-417. In fact, there is no evidence, even on Petitioner's side, to the effect that the event which resulted in the charge of cruelty in the Texas divorce case *did not* take place.

The Respondent secured her divorce from Willard R. Wigley, her former husband, on July 6, 1940. PA 11. Respondent and Petitioner did not meet until April 1, 1947. PA 205; DA 319, 320. Petitioner proposed marriage to Respondent within a week or ten days thereafter. DA 88, 89.

About July, 1948, Petitioner's former wife, Marcella, went from Delaware, where she and her husband had lived for many years, to Wyoming where she secured a divorce from Petitioner on August 30, 1948 (DA 320, 341, 342)

after Petitioner had made a substantial property settlement on her. DA 118, 350. He then married Respondent on November 20, 1948, in the City of New York after they had first secured a license by appearing together at the license bureau and exhibiting their respective divorce decrees, Respondent's from Wigley, July 6, 1940, Petitioner's from his former wife, Marcella, August 30, 1948. DA 356, 357.

VI. The Alleged Federal Question.

This heading of the petition sets forth Petitioner's position and contention and requires no comment. For reasons hereafter given Respondent denies that this case presents any substantial federal question.

VII. Reasons for Denying the Writ.

A. *There is no jurisdiction in the Supreme Court under 28 U. S. C. §1257(3) in that the giving of Full Faith and Credit by the Delaware Courts to the Texas divorce decree does not affect any substantial "right, privilege or immunity" of Petitioner.*

It cannot now be gainsaid but that the *giving* of full faith and credit by a state court to a judgment of a sister state raises generally a federal question under the present statute to the same extent as a *denial* of recognition of such judgment would have raised that question.

But for the Court to have jurisdiction under the statute it is also a familiar principle that the federal question must be substantial. It would seem to follow logically that if, under 28 U. S. C. § 1257(3) no substantial "right, privilege or immunity" of Petitioner is here involved, by the giving of full faith and credit to the Texas decree of divorce, there can be no substantial federal question and consequently no jurisdiction under the statute.

The principle which we here urge was stated by Mr. Justice Brewer in *County Court v. West Virginia ex rel Dillon,* 208 U. S. 192, at 197, as follows:

> "The party raising the question of constitutionality and invoking our jurisdiction must be interested in, and affected adversely by, the decision of the state court sustaining the act, and the interest must be of a personal, and not of an official nature."

In *Sherrer* [5] and in *Coe* [6] one of the parties to the challenged judgment attacked its validity. Such party had a direct, a personal and a substantial interest. The *Johnson* [7] case involved the right of a deceased party's daughter and legatee to challenge the validity of her father's divorce in a case where the Petitioner's property rights were affected by the challenged decree.

In the *Cook* [8] case petitioner and respondent were living together, ostensibly as man and wife, in consequence of a ceremonial marriage, when the petitioner's oversight in failing to obtain a divorce from a former husband came to respondent's attention. He then sent her to Florida to obtain a divorce and paid part of the expenses. The parties then went through another ceremonial marriage and it was the validity of that marriage and of the petitioner's antecedent divorce that were brought in issue later in a Vermont annulment case by the respondent husband who, though not a party to the Florida divorce, had indirectly sponsored and facilitated it. The Supreme Court of Vermont declined to accord Full Faith and Credit to the Florida decree and held both it and the second marriage void. There a direct and substantial right of the petitioner's wife, who opposed the annulment and who contended for the validity of the Florida divorce and the consequent validity of her marriage, was involved and a substantial federal question was presented.

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5. *Sherrer v. Sherrer*, 334 U. S. 343.
6. *Coe v. Coe*, 334 U. S. 378.
7. *Johnson v. Muelberger*, 340 U. S. 581.
8. *Cook v. Cook*, 342 U. S. 126; decision of Vermont Supreme Court after remand: *Cook v. Cook*, 86 A. 2d 923.

But, in *Cook* this Court said (342 U. S. at pp. 127, 128):

> "If the defendant spouse appeared in the Florida proceedings and contested the issue of the wife's domicile (*Sherrer v. Sherrer*, 334 U. S. 343) or appeared and admitted her Florida domicile (*Coe v. Coe*, 334 U. S. 378) or was personally served in the divorce state (*Johnson v. Muelberger*, 340 U. S. 581, 587), he would be barred from attacking the decree collaterally; *and so would a stranger to the Florida proceedings, such as respondent, unless Florida applies a less strict rule of res judicata to the second husband than it does to the first.*" (Emphasis supplied.)

In the instant case Petitioner married Respondent more than eight years after her divorce from Mr. Wigley. He did not meet Respondent until almost seven years after the divorce (PA 204) and was not concerned in interest, directly or indirectly, with the Texas divorce, except, as it turned out some eight years later, it made possible the fulfillment of his own desire to marry Respondent. He married Respondent with full knowledge of that prior divorce and with the tacit recognition that his marriage to Respondent was valid only in the event both his and her prior divorces had validity. We therefore contend that no right of Petitioner is involved where the Delaware court accorded Full Faith and Credit to the Respondent's antecedent Texas divorce.

Added emphasis is given to this point by the italicized language from the *Cook* case quoted above. Texas, like Florida, has a rule of *res adjudicata* which is not *less strict* as to the second husband than to the first. In fact the Texas rule is *more strict*. This was recognized in the opinion of the Supreme Court of Delaware (R. 437; 90 A. 2d at p. 471):

> "Under the law of Texas, a stranger to the judgment will be permitted to make a collateral attack

upon a judgment of a Texas court only if the stranger had a pre-existing right at the time the judgment was entered which has been prejudiced by its entry. *Sanger v. Tramwell* (Tex. Sup.) 66 Texas 361, 1 S. W. 378; *Urban v. Bagby* (Tex. Civ. App.) 291 S. W. 537; *National Loan and Investment Co. v. Pelphrey & Co.*, (Tex. Civ. App.) 39 S. W. 2d 926. Therefore, since the plaintiff at the time the Texas divorce decree of the defendant was entered had no pre-existing right prejudiced by that decree, Texas would not permit him to attack it collaterally."

Texas says, therefore, that Petitioner has no pre-existing right which will permit him to challenge the decree of its court divorcing Respondent from a former husband. Therefore, no "right, privilege or immunity" of Petitioner is involved where a Delaware court gives Full Faith and Credit to that Texas judgment.

B. *The Texas decree could not have been void even on Petitioner's theory; but, if Petitioner had sustained his case on the facts, would have been voidable only, and not subject to attack by Petitioner.*

The Supreme Court of Delaware said (R. 438; 90 A. 2d at p. 472):

"Fraud or collusion not relating directly to the jurisdiction of the court entertaining the action, under the law of Texas, makes a judgment entered in the action voidable and, thus, subject only to direct attack by way of appeal or proceedings in equity. *Hollis v. Hollis*, (Tex. Civ. App.) 226 S. W. 2d 129; *Bragdon v. Wright*, (Tex. Civ. App.) 142 S. W. 2d 703; *Uvalde Paving Co. v. Crabb*, (Tex. Civ. App.) 7 S. W. 2d 678; *deBeque v. Ligon*, (Tex. Civ App.) 286 S. W. 749, and *Ferguson v. Ferguson*, (Tex. Civ. App.) 98 S. W. 2d 847.

"It seems clear, therefore, that under the law of Texas a judgment is void and subject to collateral attack only when the court entering the judgment lacked jurisdiction over the subject matter or parties and when that lack of jurisdiction appears from the record of the judgment."

We submit that the Delaware Court (R. 436, 437; 90 A. 2d at p. 471) also properly read the *Cook* case, *supra*, as one in which, because of insufficient findings below, the Supreme Court could not determine whether the defendant in the divorce action had appeared or had been served.[9] This absence of factual data left open the further question of whether the plaintiff in the annulment action would be estopped to raise the lack of the defendant's appearance (if such had been the fact) in the divorce action where he had arranged for and facilitated the bringing of such action.

Neither by Cook nor by any other Supreme Court case we have seen has it been suggested that a judgment voidable only may be attacked collaterally by a stranger to it.

The case of *Texas & P. Railway Co. v. Gay*, 86 Texas 571, 26 S. W. 599, upon which Petitioner relies (Petition, pp. 11, 12), was, as observed by the Delaware Supreme Court (R. 438, 439), one of a *void* decree because the court rendering it had no jurisdiction either of the subject matter (to appoint a receiver) or of the person of the corporate defendant. The case of *Smith v. Brown*, 3 Tex. 360, 49 Am. Dec. 748, also relied upon (Petition, p. 12), is even more remote from the problem. As noticed by the Delaware Supreme Court (R. 439; 90 A. 2d at p. 472) "The action was based upon a purported obligation which on its face showed that it was in fact a wager". In short, the action did not present a justiciable controversy. In that early Texas case the court quite properly refused, *sua sponte*, to

9. See *Cook v. Cook* (Vt. Supreme Ct., 1952), 86 A. 2d 923, where, after remand, the State Supreme Court, gave final effect to the presumptive validity of the Florida divorce.

pass upon a Constitutional question raised in an action which was wholly fictitious and moot.

Petitioner's basic error is a failure to recognize the familiar distinction between intrinsic and extrinsic fraud. The English authorities cited (Petition, p. 11) are not authoritative in this Court or, in fact, in this country.

The type of fraud in connection with the entry of a judgment which will permit a successful collateral attack is that active fraud which by trickery or coercion prevents a party from making a full and fair defense. This is extrinsic fraud. Such is the well established American as opposed to the English rule. *Beale, Conflict of Laws,* Vol. 2, § 440.4, p. 1403, *et seq.* It is recognized in *U. S. v. Throckmorton,* 98 U. S. 61; *Toledo Scale Company v. Computing Scale Company,* 261 U. S. 399; *Independence Lead Mines Co. v. Kingsbury* (9th Cir.) 175 F. 2d 983. See also: *Christmas v. Russell,* 5 Wall. (U. S.) 290; *Union National Bank v. Lamb,* 337 U. S. 38.

It is, perhaps, unnecessary to repeat that in the instant case Petitioner makes no contention that there was *extrinsic* fraud in connection with the Texas divorce and his contention as to *intrinsic* fraud, i. e., collusion and perjury, is the subject of substantial, and, as we believe, convincing evidence in refutation and has not been the subject of fact findings below.

Therefore, even if there had been fraud and collusion in connection with the 1940 Texas divorce (all of which Respondent denies) it was fraud wholly *intrinsic* in nature, decided and set at rest as a part of the Texas court's adjudication, and subject to subsequent challenge only in a Texas court, in a timely action, by a party having a pre-existing right in the matter. The Constitution demands and requires that Delaware give Full Faith and Credit to that Texas decree and the present petition is frivolous and wholly insubstantial.

CONCLUSION.

Petitioner, a stranger with no pre-existing rights in his wife's 1940 Texas divorce, has no right protected by the Constitution, to attack in Delaware a divorce decree entered by a Texas court of competent jurisdiction as a result of proceedings in which both parties appeared, especially where a similar attack would surely fail in Texas. *Johnson v. Muelberger, supra.*

Quite apart from the jurisdictional question, *ante* p. 5, it seems clear to Respondent not only that the United States Supreme Court has heretofore fully determined each and every federal question involved here, but also that the Superior and Supreme Courts of Delaware decided every federal question in the case "in accord with applicable decisions of this court", *i.e.* the *Sherrer, Coe, Johnson* and *Cook* cases, cited above. Rule 38, par. 5(a), Rules of the United States Supreme Court.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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